U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
20 Massachusetts Avenue NW
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H6

DATE: NOV 1 3 2012 Office: GUANGZHOU, CHINA FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to sections 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v), and 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Guangzhou, China and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded back to the Field Office Director for further proceedings consistent with this decision.

The applicant is a native and citizen of The People's Republic of China who was found to be inadmissible to the United States pursuant to section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), for failure to attend a removal hearing to determine inadmissibility or deportability and seeking admission to the United States within five years of subsequent departure or removal.

The applicant was also found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year, and seeking readmission within 10 years of his last departure from the United States.

The applicant's spouse is a U.S. citizen. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his relatives.

The Field Office Director concluded that based upon a finding of inadmissibility under section 212(a)(6)(B) of the Act, no waiver was available to the applicant and the application was denied accordingly. Therefore, no determination on the merits of the applicant's inadmissibility waiver under section 212(a)(9)(B)(i)(II) was made. *See Decision of Field Office Director,* dated April 6 2011.

On appeal, the applicant asserts that his United States citizen spouse would suffer extreme hardship without the applicant's presence in the United States and alternatively that the applicant is not inadmissible to the United States.

The record includes, but is not limited to, counsel's brief, statements from the qualifying relative and the applicant, financial records and various immigration applications. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(B) of the Act provides:

> Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

In the present case, the record reflects that the applicant attempted to enter the United States without possession of a valid passport on May 22, 1993 and was consequently placed into exclusion proceedings. The applicant failed to appear for an immigration court hearing to determine his deportability on August 9, 1993 and was ordered excluded. The applicant then filed Motions to Reopen Exclusion proceedings with the Immigration Judge and the Board of Immigration Appeals which were dismissed in finality on February 6, 1995. Under section

212(a)(6)(B) of the Act an applicant must be placed into removal proceedings after April 1, 1997 for this inadmissibility provision to apply. Accordingly, since the applicant was placed into exclusion proceedings prior to April 1, 1997, section 212(a)(6)(B) of the Act does not apply in this case.

The applicant was also found inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)of the Act provides:

> (B) ALIENS UNLAWFULLY PRESENT.-
>
> (i) In general- Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> ...
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
>
> (ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.
>
> ...
>
> (v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296.301 (BIA 1996).

Upon review, the record does not support that the applicant is inadmissible under section 212(a)(6)(B) of the Act. The Field Office Director did not reach the merits of the applicant's request for a waiver under section 212(a)(9)(B)(v) of the Act, including analysis of whether he established extreme hardship to a qualifying relative. Accordingly, the AAO will remand the matter to the Field Office Director for final determination of whether the applicant is inadmissible under section 212(a)(6)(B) of the Act, and if not, a full adjudication of the merits of the applicant's request for a waiver under section 212(a)(9)(B)(v) of the Act.

ORDER: The matter is remanded to the Field Office Director for a determination of whether the applicant is inadmissible under section 212(a)(6)(B) of the Act in light of this decision. If the applicant is found not inadmissible under section 212(a)(6)(B) of the Act, the Field Office Director shall adjudicate the merits of the applicant's application for a waiver under section 212(a)(9)(B)(v) of the Act. If the Field Office Director issues a new decision that is adverse to the applicant, that decision shall be certified to the AAO for review.